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NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

EDWARD G SPRANGER,
PETITIONERS

V.

ANTHONY A.FRANK POSTMASTER GENERAL,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER NINTH CIRCUIT OF APPEAL ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW DIRECTLY CONTRARY TO THE STATUTORY LANGUAGE OF THE FEDERAL EMPLOYEES COMPENSATION ACT; AND THEREFORE, IN CONFLICT WITH THE U.S. COURT OF APPEAL FOR THE FEDERAL CIRCUIT AND THIS COURT'S PRECEDENT.

II. WHETHER NINTH CIRCUIT OF APPEAL RENDERED A DECISION IN CONFLICT WITH THE COURT OF APPEAL FOR THE FEDERAL CIRCUIT AND THIS COURT IN UPHOLDING THE MERIT SYSTEMS PROTECTION BOARD DECISION TO DENIED THE PETITIONER A NEW HEARING BEFORE THE BOARD ON PETITION'S CLAIMS THAT RETROACTIVE AWARD BY THE SECRETARY OF LABOR NEGATED THE AGENCY'S CHARGES OF AWOL, FAILURE TO FOLLOW LEAVE PROCEDURES, INSUBORDINATION, AND WARRANTED A FINDING THAT THE PETITIONER'S REMOVAL RESULTED FROM HIS COMPENSABLE INJURY.

III. WHETHER THE COURT OF APPEALS FOR THE NINTH CIRCUIT RENDERED A DECISION IN

CONFLICT WITH THE COURT OF APPEAL FOR THE FEDERAL CIRCUIT IN FAILING TO MAKE A SEPARATE DETERMINATION OF WHETHER THE MERIT SYSTEMS PROTECTION BOARD FAILED TO GIVE SUBSTANTIAL WEIGHT TO EVIDENCE THAT PETITIONER WAS INJURED AT WORK OR ILL ON THE DAY IN QUESTION WHICH GREATLY REDUCED THE PETITION'S CONDUCT; AND THEREFORE, FAILURE BY THE BOARD TO MITIGATE THE REMOVAL PENALTY IS AN ABUSE OF THE BOARD DISCRETION.

IV. WHETHER THE COURT OF APPEALS FOR THE NINTH CIRCUIT ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW RELATING TO ABANDONING CLAIMS OF DISCRIMINATION BEFORE THE MERIT SYSTEMS PROTECTION BOARD; THEREFORE, THE COURT DO NOT HAVE JURISDICTION.

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I. WHETHER NINTH CIRCUIT OF APPEAL ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW DIRECTLY CONTRARY TO THE STATUTORY LANGUAGE OF THE FEDERAL EMPLOYEES COMPENSATION ACT; AND THEREFORE, IN CONFLICT WITH THE U.S. COURT OF APPEAL FOR THE FEDERAL CIRCUIT AND THIS COURT'S PRECEDENT.

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IN THE SUPREME COURT OF THE UNITED STATES

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v.

ANTHONY A. FRANK POSTMASTER GENERAL,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Petitioner Edward G Spranger respectfully prays that writ of certiorari issue to review the judgment and opinion of the United States Court of appeals for the Ninth Circuit, entered on November 24,1993 and petition for a rehearing was denied on December 23,1993.

OPINIONS BELOW

The opinion of the court of appeals for the Ninth Circuit have not been reported or is it appropriate for publication and may not be cited to or by the courts of this circuit except as provided by the Ninth Circuit R.36-3, it is reprinted in the appendix hereto,

page 41.

The memorandum decision of the United States District Court For the Eastern District of California have not been reported. Its is reprinted in the appendix hereto, page 56.

The decision of the United States Merit Systems Protection Board San Francisco Regional office is reprinted in the appendix hereto page 84.

The decision of the United States Department of Labor Employment Standards administration office of Workers' Compensation Programs is reprinted in the appendix hereto, page 95.

JURISDICTION

The final judgment of the Court of Appeal for the Ninth Circuit was entered on November 24,1993. On December 23, 1993, appellant's petition for a rehearing was denied, therefore, this court has jurisdiction to review the judgement of the Court of Appeal for the Ninth Circuit pursuant to 28, U.S.C. 1254(1).

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STATEMENT OF THE CASE

A: Judicial History:

This is a "mixed case appeal" of both discrimination and nondiscrimination claims where the petitioner seek review of the decision of the Merit Systems Protection Boards (MSPB) regarding his claims against the United Stated Postal Service (USPS) challenging the USPS termination of his employment and job reinstatement rights under the federal employees Compensation Act (FECA). The petitions MSPB appeal involved allegation of discrimination, therefore, judicial review of the final board order lies in the district courts. On the discrimination claim, the petitioner shall have the right to have the facts subject to trial de novo by the reviewing court. 5 USC 7703 (c). The non-discrimination claim in a mix case is, however, reviewed on the administrative record under 7703(c)(1)-(3). Romain v.Shear, 799 F.2d 1416, 1422 (9th Cir.1966).

The petitioner argued in district courts. Due to the fact that Secretary of Labor vacated its prior award denying petitioner compensation, and only after the petitioner first appeal to the MSPB on reemployment rights and petitioner arbitration for just cause, did the Secretary of Labor issued a new decision which retroactive entitlement to the petitioner for benefits under the FECA. Therefore, the Secretary of Labor decision warrant a finding that the petitioner conduct on the day in question is protective by the FECA and that the petitioner's injury of October 6, 1988 was substantially related to his removal. The petitioner contend that MSPB decision to applied the doctrine of res judicata and collateral estoppel is arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law, unsupported by substantial evidence. 5 USC 7703 for the following reasons.

First, the petitioner contend that he

elective continuation of pay to cover his absent on the day of the incident; therefore, he was not absent without leave (AWOL) as charged by the agency. Even if the Secretary of Labor would have denied his claim for two hour of continuation of pay on October 8,1988, he still may have used annual or sick leave to cover his absence and thus he was not AWOL. 5 USC 8118 (a) (d).

Secondly, the petitioner held that he had a right under FECA to initially choose his own physician. The agency may only require a fitness-for-duty examination but the FECA does not provide and additional authority for agency-conducted medical examinations. Therefore, the petitioner was not insubordinate or failed to follow instructions under the FECA. 5 USC 8103

Third, the petitioner claim that the agency shall immediately and unconditionally resumes his former or an equivalent position, as well as all other attendant rights which the petitioner would have had, or acquired, in

his former position had he not been injured or disabled. 5 USC 8151 Because petitioner's injury cause or was substantially related to his separation, the petitioner submitted evidence that his compensable injury; cause the petitioner to leave work; cause the petitioner to believe that his sick leave was approve; cause the petitioner to believed he had right under FECA to choose his own physician and to decline agency medical examinations. Also the reason stated by the agency " Due to the fact that Mr. Spranger was involved in an on the job injury on the day in question, Mr. shaw was acting to protect the interests of the Postal Service, by attempting to get Mr. Spranger to return to the Medical unit for verification of his illness". Therefore, the petitioner's separation is unequivocally result of or substantially related to his compensable injury. 5 C.F.R. 353.307 Roche v. USPS 828 F.2d 1555 Fed. Cir. 1987

Petitioner also contended that in his

first appeal to the MSPB there was no determination of entitlement under the FECA by the Secretary of Labor for his injury of October 6,1988 thus there was no compensable injury, restoration right under FECA, and without the Secretary of Labor determination, the petitioner could not establish a relationship between compensable injury and petitioner separation. Therefore, the petitioner claim that the MSPB abuse its discretion by not considering evidence of misrepresentation of facts; whether the cause of action is different from those raised in the first appeal; evidences in the second appeal is not identical as first appeal; and when Board arbitrary applied the doctrine of res judicata and Collateral Estoppel to decided the petitioner second or mixed case appeal and refused to review the restoration right under FECA.

The district court affirmed the postmaster's contentions and held (Appendix B): that the MSPB's mix case decision was not

aritrary, capricious, and abuse of discretion, or otherwise not in accordance with law; or unsupported by sbstantial evidence for the following reason. The MSPB, agency, or any court can make it own determination that the petitioner injury of October 6,1988 is a non-compensable injury thus the Secretary of Labor determination is irrelevant and the agency did not misrepresent the facts that the petitioner injury of October 6, 1988 was non-compensable before the arbitrator or MSPB. The petitioner cannot use new evidence that he sustained a compensable injury and his conduct is protected under the FECA to challenge the arbitrator's decision because during arbitration he made no attempt to relate the service's decision to terminate him to his having suffered a compensable injury. The petitioner did not received payment for a compensable injury on October 6,1988 and so was obliged to obey his supervisor's order, thus the arbitrator correctly found that there

was no basis upon which to mitigate the penalty. The MSPB did not erred by applying the doctrine of res judicata to the Board earlier decision on the petitioner restoration rights under FECA because the petitioner injury of October 6, 1988 was non-compensable and The Secretary of Labor only granted compensation after the petitioner termination. Also, the MSPB did not erred by applying the doctrine of collateral estoppel to the aritration proceedings.The petitioner abandoned claims of race, sex, reprisal discrimination by not raising them before the MSPB although the hearing officer addressed these claims sua sponte in the MSPB's initial decision these claims are not properly before the court.

The U.S Court of Appeal 9th Cir. affirmed (Appendix A) the district court decision and concluded that MSPB's regulations do not require that the MSPB to determine first that and employee has an injury that is compensable

before it considers whether the employee was terminated because of that injury. Secretary of Labor Office of Workers's Compensation Programs determination that petitioner's injury was compensable could not affect the MSPB determined in the first MSPB appeal. Consequently, the MSPB's decision in the MSPB appeal properly was res judicata. To the extent that arbitrator in order to resolve the question that petitioner was terminated for just cause, was a mixed issue of law and fact which is appropriated for application of preclusion (collateral estoppel). As with the race and sex claims, petitioner did not raise his raise his EEO claims during the MSPB Mix Case Appeal. Having abandoned them may not revive it in this federal action.

Factual History

Petitioner, Edward G Spranger, a white 43 years old male preference eligible Vietnam Veteran, employed at the U.S Postal Service's General Mail Facility on Royal Oak Drive in

Sacramento, Ca. for nineteen years.

The petitioner first injured his right upper back at work on February 25,1988, at the time the petitioner was seen by USPS's Doctor William G. Arbonies who diagnosed the petitioner's injury as job related acute lumbar strain of the upper back and it was accepted by Secretary of Labor (OWCP). On the day of the incident October 8,1988, the petitioner re-injury the same region of his right upper back. The petitioner was directives to see USPS Doctor William B. Arbonies for initial medical examination/treatment. Doctor Abonies filed a duty statue report (CA-17) which contain no reference to either total/temporary disability or light duty restriction or offer of light duty assignment. The petitioner disagreed with the USPS Doctor as the petitioner choice of physician and declined any more treatment of his injury. When the petitioner returned from the medical unit filed claim for a traumatic injury. The petitioner's supervisor instructed

the petitioner in writing that the agency does not provide or have the authority to conduct medical examinations, and any absent due to his injury would be approved. Because of persistent back pain cause by his injury earlier, the petitioner requested sick leave to cover his absence for the remainder of his shift. The petitioner's supervisor instructed the petitioner to return to the USPS medical unit for a examination to verify his injury. The petitioner left work without going to the medical unit.

The next days, the petitioner's supervisor interview the petitioner about his conduct. The petitioner stated that he was unable to work and requested sick leave because of his on the job injury, and it was his understanding of written instruction given to him that he could decline USPS examination/treatment. After considering the petitioner's claims of mitigating circumstances and all relevant factors under Douglas v. Veterans Administration 5 MSPB

280,306 1981, the agency terminated petitioner employment. Pursuant to procedures under title VII of the Civil Right Act of 1964 and 39 U.S.C. section 1005 (a)(2) of the Postal Reorganization Act, petitioner filed a mixed case complaint first with the agency rather the with the MSPB and invoke union grievance/arbitration procedure at the same time. (Hall v. USPS 26, M.S.P.R. 233 1985)

On December 19,1989 the Secretary of Labor accepted agency's claims the petitioner lost all entitlement to compensation when his misconduct, unrelated to his injury, resulted in his termination; and therefore, the Secretary of Labor denied the petitioner injury claim and advised the petitioner to apply for mandatory job restoration under personnel management regulation. On February 24,2989, the USPS denied petitioner request for restoration base on Secretary of Labor decision of February 1, 1989.

The petitioner appealed the agency's denial of restoration right under FECA to the

MSPB. The agency moved for dismissal for lack of jurisdiction claiming that the Secretary of Labor determine that the petitioner lost his entitlement to compensation and restoration right under FECA and that decision cannot be review by the board. The MSPB held although the petitioner requested a hearing in connection with his appeal. A hearing is deny because the petitioner made a non-frivolous claim which would establish board jurisdiction: and therefore; dismissed the petitioner' appeal. This appeal was not appeal to the U.S. Court of Appeal Federal Cir.

On October 8,1989, the Arbitrator issued decision affirming the USPS claims; that the Secretary of Labor determined that petitioner lost his entitlement to compensation and restoration right under FECA; that the MSPB determined that the petitioner injury was not substantially related reason for termination; that due to back pain affected petitioner judgement and performance or prevented him

form following his supervisor's directive; and therefore, removal of was issued for just cause.

On September 15,1989, the USPS issued it's final decision denying the petitioner's mix case complaint. A timely MSPB appeal follow. December 19,1989 the Secretary of Labor re-issued its decision that the petitioner October 6,1988 injury is compensable and is entitle to right under the FECA and advised the petitioner to apply for reemployment right under FECA. The petitioner amended his mix case appeal to include reemployment right. The MSPB denied the petitioner's Mix Case Appeal. The petitioner then petition the Equal Employment Opportunity Commission (EEOC) for review of the board decision. The EEOC upheld the MSPB decision and held that the petitioner did not establish a prima facie case of handicap, sex, or race discrimination, but noted that the petitioner did established a prima facia case of reprisal discrimination for his EEO actives and failed

to show a pretext for the agency nondiscriminatory reason. Judicial review of his mixed case appeal follow.

REASONS FOR GRANTING THE WRIT

I. WHETHER NINTH CIRCUIT OF APPEAL ERRONEOUSLY DECIDED AND IMPORTANT QUESTION OF FEDERAL LAW DIRECTLY CONTRARY TO THE STATUTORY LANGUAGE OF THE FEDERAL EMPLOYEES COMPENSATION ACT; AND IN CONFLICT WITH THE U.S.COURT OF APPEAL FEDERAL CIRCUIT AND THIS COURT PRECEDENT.

The Ninth Circuit has decided important and recurring issue for federal workers who are retroactive awarded entitlement under the Federal Employees' Compensation Act (FECA) by the Secretary of Labor after prior appeal to the MSPB were made for denial of reemployment right. The Ninth Circuit interpretation of the FECA ignores the plain language of the statute and prior decisions by this court and the Federal Circuit for the following reasons.

A: The Federal Employee Compensation Act (FECA) (5 U.S.C. & 8101 et seq.) establishes under the Secretary of Labor a program of workman' compensation for government employees

injured in work-related accidents. This court held that workmen's compensation statutes were enacted to provide Federal injured workers with a quicker and more certain recovery than could be obtained from tort suits based on common law theories. United States v. Demko, 385 U.S. 149,151,87 S.Ct.382,17 L.Ed.258 (1966). Therefore, to insure uniformity of interpretation and policy in the administration of FECA, the Secretary of Labor is vested with the power to administer, and decide all questions arising under FECA and his determination are final and may not be review by the courts. 5 USC 8145 and 8128 (b) (1) & (2) Gunston v.United States, 358 F.2d 303 9th Cir., cert. denied, 384 U.S.993, 86 S.CT. 1904, 16 L.Ed.2d 1010 (1966)

B: The Secretary of Labor's determination of petitioner's statutory entitlement (Appendix D) under the FECA in this case included the following. (1) The government shall authorize continuation of pay or the petitioner may use

annual or sick leave to his credit at the time the disability begins. If the claim is denied by the Secretary, payments under this section shall, at the option of the petitioner, be charged to sick or annual leave. 5 USC 8118 (2) Petitioner's has a statutory right to choose his/her own physician for treatment and examination 5 USC 8103. (3) The petitioner has a statutory right under the FECA to be restore to duty because in 1974 Congress amended FECA, to provided restoration to duty for civil service employee who have recovered from their job related injuries or illnesses 5 USC 8151. The employee who fully recovers within one year and seeks restoration has statutory right to return to his former position or an equivalent one immediately upon cessation of compensation by the Secretary of Labor 5 CFR 53.302.

As stated by this court the Secretary of Labor determination that the petitioner is entitle to all of the above entitlement under

the FECA in not reviewable by the court.

The agency (USPS) denial of the petitioner's statutory reinstatement right under the FECA (Appendix F page 105) is based on the following reasons. The Secretary of Labor rejected the petitioner's initial claim for his October 6,1988 injury (Appendix G page 107). On October 6,1988, Spranger committed another act of insubordination when, after filing a claim and receiving written instruction for a compensable injury, petitioner disregarded the instruction of his supervisor to report to the postal facility's medical dispensary as a precondition to granting petitioner sick leave for the remainder of the day to determine the extent of petitioner's injury of that day, petitioner ignored two additional requests by his supervisor to discuss the matter further and, instead, he simply walked off the job without authorization prior to the completion of his shift. Based upon his incident and

petitioner's history of insubordination, the agency terminated his employment. Without any review of the new determination by the Secretary of Labor awarding the petitioner entitlement including reinstatement right under FECA, the agency refused to reemploy the petitioner because the MSPB already dismissed the petitioner claim for reinstatement right in a prior appeal.

Pursuant to 5 CFR 353.401 (a) which provides that and employee who is entitled to restoration under 5 USC 8151, and who is denied restoration by his agency, may appeal to the MSPB. Therefore, the petitioner appeal to the MSPB in his second mix case appeal the agency's failure to restore him to duty. The petitioner argued that the Secretary of Labor did not determine that his injury of October 6,1988 was a compensable injury in his prior appeal, thus he could not claim that his separation was cause or result of that compensable injury. The petitioner prior or

first appeal (Appendix E page 96) was premature appeal which the MSPB dismiss in accordance with Board's procedures manual Ch.3 for lack of jurisdiction without prejudice to refiling. MSPB's jurisdiction is based on the following; (1) granting and cessation of compensation by the Secretary of Labor; (2) claim that separation or removal was substantially related to the compensable injury, 5 CFR 353.307, which pertains to an employee who has sustained a compensable injury and whose separation either resulted from, or was substantially related to, a compensable injury is entitled to restoration. Cox v. MSPB 817 F.2d 100 Fed. Cir 1987: Minor V MSPB F.2d 280 Fed. Cir. 1987: Raicovich V. USPS 675 F.2d 417,424 D.C Cir. 1982 Roch V USPS 828 F.2d 1555 Fed Cir.

The MSPB has statutory authority under 5 USC 7701 to hear and adjudicate all matters within its jurisdiction. It also has authority to order any federal agency or employee to

comply with any order or decision issued and to enforce compliance with the other or decision. 5 USC 1205 (a)(1),(2). For the Board to hear a case, a statute, rule, or regulation must provide an affirmative grant of jurisdiction. The Board lacks authority to broaden its statutory authority, no matter how compelling the injustice presented by an employee. Noble v. TVA, 892 F.2d 1013, 1014 Fed. Cir. In this case, the Board jurisdiction is granted when the petitioner submitted new/second mix case appeal to the MSPB claiming that the Secretary of Labor has determined that petitioner's injury of October 6, 1988 is a compensable injury, has recovery from that injury, and established that compensable injury cause or result to petition's separation. Therefore, Board has jurisdiction over the petitioner's second or mix case appeal. (5 CFR 353.401 failure to restore a former employee to employment following partial of full recovery from a

compensable injury.)

In light of later action by the Secretary of Labor,the Board arbitrary refusal to review the petitioner's claim of restoration rights because or petitioner's prior appeal was not a premature appeal and the matter of right to restoration was resolve by a final decision of the MSPB; and therefore, it is res judicata and is not properly before the Board in connection with the petitioner, second/mix case appeal. The Ninth Circuit affirm the MSPB decision.

The following questions for this court whether The Ninth Circuit erroneously decided; that petitioner's prior appeal defeated the petitioner's second appeal which contains a retroactive award by the Secretary of Labor granting the petitioner restoration right and other benefits under the FECA.

First, precedent of this Court; to insure uniformity of interpretation and policy in the administration of the FECA, the Secretary of

Labor is vested with the power to administer, and decide all question arising under FECA and his/her determinations are final and may not be reviewed by the courts. 5 U.S.C 8145 and 8128(b)(1)&(2) Gunston v. United States, 358 F.2d 303 (9th Cir) cert denied 384 U.S. 993,86 S.Ct. 1904,16 L.Ed.2d 1010 (1966).

A reasonable person would conclude that if there no compensation injury determination by the Secretary of Labor there no claim that the separation was cause or result of compensation injury. Therefore, the MSPB would lack jurisdiction over the petitioner first appeal because there no rule or regulation that would grant jurisdiction Noble V. TVA, 892 F.2d 1013 Fed. Cir. (5 CFR 353.401 (a) employee who sustained a compensable injury and who is denied restoration by the agency may appeal to the board.)

The Ninth Circuit's decision that the MSPB had jurisdiction over the petitioner prior appeal and to decide the petitioner

entitlement to restoration right under FECA before the Secretory of Labor determination is erroneous conclusion of FECA and in conflict with the U.S Court of Appeal for the Federal Circuit and this Court.

C. Doctrine of Res Judicata:

The doctrine of judicata which bar relitigation of a prior appeal on the same cause of action. Lawlor v. National Screen Service, 349 U.S. 322, 329, 75 S.Ct. 865 , 869, 99 L.Ed. 1122 (1955).

The Ninth Circuit erred in its decision that the both appeal to the MSPB by the petitioner involved essentially the same cause of action. In the first appeal to the Board, the Secretary of Labor held that the petitioner did not have a compensable injury or entitlement to the FECA including restoration rights claim. That decision by the Secretary of Labor is not reviewed by any court for reasons stated above. In the second appeal to the MSPB, the Secretary of Labor

withdrew it original decision and retroactived awarded to the petitioner under FECA. In the petitioner's circumstances, it cannot be said that the petitioner had a fair, reasonable opportunity to have his claim of restoration right and other entitlements under the FECA entertained by the MSPB. Rather a hypertechnical application of judicially created doctrines would deny him a hearing. Ross v.International Brothers of Electrical Workers 634,F.2d 453 9th Cir. 1980. Therefore, the petitioner is entitle to a new hearing before the board.

Moreover, MSPB's precedent; Green v. Dept. of Army 38 M.S.P.R 52 1988 held that the doctrine of res judicata cannot be applied following the Secretary of Labor determination of compensable injury where prior MSPB decision upholding denial of restoration and other charges were made before the employee was granted workmans' compensation benefits; and therefore, vacated U.S court of appeal fed

cir. decision up holding the Board fist decision.

D: In the second mix case appeal the USPS misrepresented the facts by arguing that the Secretary of Labor decision concerning the petitioner's Claim for compensation benefits was rejected by the OWCP and the petitioner lost all his entitlement rights under the FECA (appendix F) not only to the Board but to the arbitrator as well. Therefore, Ninth Cir. erred by not lifting the bar of res judicata in conflict with United States v. Pueblo of Taos, 515 F.2d 1404, 1406 (Cl. Ct. 1975).

Moreover, the Federal Circuit held in Minor v. MSPB 819 F.2d 280 Fed. Cir. 1987 and Cox v. MSPB 817, F.2d 100 Fed. Cir 9187. when prior board/arbitration decision affirming removal for just cause were made before federal employee was granted workman' compensation benefits by Secretary of Labor. A federal employee who was separated for cause must show that his/her separation resulted

from or was substantially related to their compensable injury. 5 CFR 353.103 (c)(1) Unlike Cox or Minor, the petitioner just did not argue that he obtained a workman's compensation benefits for his disability and should be reemployed, but offered evidence to the Board that: (1) The agency stated reasons in the grievance /arbitration decision (Appendix H) " Due to the fact that Mr.Spranger was involved in an on the job injury on the date in question, Mr. Shaw was action to protect the interests of the Postal Service, by attempting to get Mr. Spranger to return to the Medical Unit for verification of his illness. The Medical unit also acts as a control point in administering initial medical treatment for employees injured on the job, and coordination of any outside medical that is either requested by the employee or deemed necessary by the Postal Physician.": (2) The petitioner was separated from his position for failure to return to the USPS Medical Unit for

a medical examination as precondition for granting him sick leave for his on the job injury of October 6,1988: (3) The compensable injury caused the petitioner's supervisor to direct him to the USPS Medical Unit: (4) Written instructions on the compensable injury form CA-1 caused the petitioner to decline USPS examination/treatment because of his right to choose his own physician: (5) Filing compensable injury claim under FECA caused the petitioner to believed that his absence was approved and was the only reason the petitioner left work. Therefore, the Ninth Circuit decision that the petitioner lost his restoration is directly conflicting with the decision of the Fed. Cir. decisions of Minor and Cox which are virtually identical.

II. WHETHER NINTH CIRCUIT OF APPEAL RENDERED A DECISION IN CONFLICT WITH THE COURT OF APPEAL FEDERAL CIRCUIT AND THIS COURT IN UPHOLDING THE MERIT SYSTEMS PROTECTION BOARD DECISION TO DENIED THE PETITIONER A NEW HEARING BEFORE THE

BOARD ON THE PETITIONER'S CLAIM THAT RETROACTIVE AWARD BY THE SECRETARY OF LABOR NEGATED THE AGENCY'S CHARGES OF AWOL FAILURE TO FOLLOW LEAVE PROCEDURE, INSUBORDINATION, AND WARRANTED A FINDING THAT THE PETITIONER'S REMOVAL RESULTED FROM HIS COMPENSABLE INJURY.

A recurring problem for federal worker who appeal to the MSPB is the right to a hearing before the MSPB. The right to a hearing is granted to employees by Congress in the Civil Service Reform Act of 1978, 5 U.S.C & 7701(a)(1) (1982). As the U.S. Court of Appeal Federal Cir. pointed out in Calahan v. Department of the Navy. 748 F.2d 1558, Congress included the provision on hearings in that portion of the Act in order to protect the right of employees and to guarantee a full and fair consideration of their case. In Frampton v. Department of Interior 811 F.2d 1486 Federal Cir. held that a fair hearing for employees who appeal to the MSPB from agency decisions is the base cornerstone of employee

rights. Under the statutory scheme, the hearing before the presiding official of the MSPB is the only opportunity which a discharged employee or one subjected to an adverse personnel action has to a de nova trial before an impartial judge. This is so because the scope of judicial review is severely limited by the language of the statute. U.S.C. 7703(c)(3) The MSPB has held that an employee's statutory right to a full and fair hearing includes the following: An appellant under 5 U.S.C. 7701 has a statutory right to a hearing. Inherent in this right to a hearing is the right of appellant to testify and present witnesses in support of his or her contentions. Intestate Commerce Commission v. Louisville & Nashville R. Co., 227 U.S. 88, 33 S.Ct. 185,57 L.Ed.431 (1913); Lononer v. Denver, 210 U.S. 373,386,28 S. Ct. 708, 714, 52 L.Ed.1103 (1908) Also inherent in appellant's right to a hearing is the right to present every available defense. American

Surety Company V. Baldwin, 287 U.S. 156, 53 S. Ct. 98, 77 L.Ed. 231 (1932)

In the petitioner's case, the Ninth Circuit affirmed the MSPB decision to deny the petitioner a new hearing because of the doctrines of res judicata and collateral estoppel which barred relitigation of issues because the Arbitration Decision meet all elements of preclusion. Therefore, it rejected the petitioner's claim that the retroactive award by the Secretary of Labor negated the agency's charges of AWOL, Failure to follow Leave Procedures, and Insubordination.

The Ninth Circuit is in conflict with this Court's precedent because the issue that the petitioner's conduct was protected under FECA and retroactive award by the Secretary of Labor negated the agency's charges of AWOL, and failure to follow leave procedures, which were not litigated in the prior suit and does not estopp the petitioner from relitigating that issue before the MSPB in a new hearing.

Lawlor v.Nation Screen Service Corporation cite as 75 S.CT. 865

III. WHETHER THE COURT OF APPEALS RENDERED A DECISION IN CONFLICT WITH THE COURT OF APPEAL FEDERAL CIRCUIT IN FAILING TO MAKE A SEPARATE DETERMINATION OF WHETHER THE MERIT SYSTEMS PROTECTION BOARD FAILED TO GIVE SUBSTANTIAL WEIGHT TO EVIDENCE THAT PETITIONER WAS INJURED AT WORK OR ILL ON THE DAY IN QUESTION WHICH GREATLY REDUCED THE PETITIONER'S CONDUCT; AND THEREFORE, FAILURE BY THE BOARD TO MITIGATE THE REMOVAL PENALTY IS AN ABUSE OF THE BOARD DISCRETION.

The decision of the Ninth Circuit is in direct and irreconcilable conflict with the holding of the Fed. Cir. of Appeal. By contrast, the Fed. Cir. held.

The standard for review of MSPB decisions is set forth in 5 U.S.C. 7703(3). The court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be (1) arbitrary,

capricious, and abuse of discretion, or otherwise not in accordance with law. In a case remarkable similar to the petitioner case, The U.S. Court of Appeal Federal Circuit held in Mitchum v. Tennessee Valley Authority 756 F.2d 82 1985 failure of the MSPB to give weight to evidence of illness and to mitigate removal is an abuse of discretion by the MSPB. Like Mitchum agency disputed the fact that the Petitioner was actually incapacitated on the day in question. The petitioner presented medical evidence (Appendix J and I) that he was incapacitated on the day in question and the agency made no contrary showing. Even though there is evidence that the petitioner was injured and ill at the time of the incident, the MSPB failed to give any weight to evidence of: (1) injury/illness; (2) claim for continuation of pay and the use of annual or sick leave under 5 USC 8118; (3) employee choice of physician under 5 USC 8103. Therefore, without question board abuse its

discretion not to mitigate the removal.

IV. WHETHER THE COURT OF APPEALS ERRONEOUSLY DECIDED AND IMPORTANT QUESTION OF FEDERAL LAW RELATING TO ABANDONING CLAIMS OF DISCRIMINATION BEFORE THE MERIT SYSTEMS PROTECTION BOARD; THEREFORE, THE COURT DO NOT HAVE JURISDICTION.

A recurring problem for pro se petitioners is that they do not frame issues with the precision of common law pleading. Roche v. USPS 828 F.2d 1555 Fed. Cir. 1987. The petitioner repectfully direct this Court to question 24 of the petitioner's appeal form to the MSPB. "Have you filed a formal discrimination
complaint concerning the matter which you are seeking to appeal with your agency or any other agency?" The petition answer "Yes." Has there been a decision? Answer "yes" attach copy. In the agency"s motion to dismiss petitioner's mix case appeal. " Barring your denial of res judicata, the agency requests

that you limit the issue of his appeal solely to the Appellant's claim of discrimination as outlined in his EEO complaint." The agency argued before the Board that the petitioner has a discrimination complaint of sex, race, reprisal before the board, but argued in court that the petitionér abandon these claims because he failed to argued them at the hearing or in his appeal. At the prehearing conference which was not recorded the petitioner was limited by the administrative judge to what will be discuss at the hearing. Also in the Administrative Judge decision of February 20,1990 based his decision on the record. " On February 14,1989, appellant also filed a formal Equal Employment Opportunity (EEO) complaint alleging that his removal was substantively defective because of discrimination based on his race (white), (Sex (Male), handicap (partial disability from acute back sprain), and reprisal for prior EEO Activity. On September 15, 1989, the agency's

EEO office issued a final 6- page decision finding that appellant had failed to establish a prima facie case of either race, sex, physical handicap, or reprisal discrimination. See Appeal file, tab 4D." Therefore, the petitioner clearly put the Board and agency on notice of his discrimination claims and did not abandoned these discrimination claims, or omitted them from his MSPB appeal. The MSPB did not addressed these claims sua sponte. Clearly the petitioner is entitled have the courts review his discrimination claims through a trail.

CONCLUSION

For the foregoing reasons, in addition to the reasons stated by petitioner, the petition for granting ceriorari should be granted.

Respectfully Submitted

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APPENDIX

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD G. SPRANGER,
PLAINTIFF-APPELLANT,

V.

ANTHONY A. FRANK, POSMASTER GENERAL, UNITED STATES POSTAL SERVICE,
DEFENDANT-APPELLEE.

MEMORANDUM

NO.92-15812

D.C. NO. CV-90-01595-DFL

Appeal from the Uninted States District Court for the Eastern District of California
David F. Levi, District Judge, Presiding

Subitted October 8, 1993 **
San Francisco, California

Before: Thompson and O'scannlain, Circuit Judges; Nielsen, District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 92-15812

D.C NO: CV-90-01595-DFL

Re: Decision not for publication

Date: November 24,1993

Edward G Spranger appeals pro se a summary judgment against his various employment claims against the United States Postal Service (USPS) termination of his employment and subsequent refusal to rehire him. Because Spranger has alleged both discrimination and nondiscrimination claims against the USPS, his

action constitutes a " mixed case." 5 USC 7703(b)(2): Romain v. Shear, 799 F.2d 1422 9th Cir. 1986

I

Spranger asserts that he is entitled to be restored to employment under the Federal Employees Compensation Act, 5 USC 8101, 8151, because he recovered from a work-related injury within a year of his discharge (the "Restoration Right claim"). The district court affirmed the Merit Systems Protection Board's (MSPB) decision that spranger's first appeal before the MSPB ("First MSPB Appeal") was re judicata for his Restoration Rights Claim.

Spranger contends that the First MSPB appeal cannot be res judicata because his right to appeal to the MSPB had not matured at the time of that action. He asserts that his right to appeal matured at a later time when he received a decision from the Office of Workers' Compensation Programs (OWCP)

determining that he had a "compensable" injury.

This argument is inapposite because Spranger's First MSPB appeal was dismiss on grounds unrelated to whether he had a "compensable" injury. A former federal employee may appeal an agency's failure to rehire him or her to the MSPB only if he or she was separated from the agency as a result of a compensable injury. 5 C.F.R. 353.103(b), 353.401(a). MSPB regulations don not require the MSPB to determine first that an employee has and injury that is compensable before it considers whether the employee was terminated because of that injury.

The MSPB determined in the First MSPB Appeal that Spranger had not been separated as a result of his injury was "compensable" could not affect this decision and, thus, was irrelevant. Consequently, the MSPB's decision in the First MSPB Appeal properly was res

judicata. see, e.g. Daniel v. Office of Personnel ,Management, 43 M.S.P.R. 599, 601 (1990)

II

Spranger contends that the MSPB improperly concluded in his second appeal before the MSPB (" Second MSPB Appeal") that his termination claim (the "Just Cause Claim"), brought under the Civil service Reform Act, 5 USC 7701, was barred by issue preclusion (collateral estoppel). The district court affirmed the MSPB's decision and granted summary judgment.

Spranger argue that issue preclusion was inapplicable because his just cause claim involved the following "purely legal" question: (1) whether he had a right to select his own physician for treatment and (2) whether he was entitled to continuation of apply and sick leave. However, to the extent that they were relevant to Spranger's termination, these issues were addressed by

the arbitrator in order to resolve the ultimate question of whether Spranger has been terminated for just cause and in reprisal for his union activities, This question was a mixed issue of law and fact, which is appropriate for application of issue preclusion. See, e.q., Wynne v. Department of the Army, 46 M.S.P.R 320 1990, aff'd without opin., 940 F.ed 677 Fed. Cir. 1991.

Spranger also argues that the MSPB failed to make an independent determination of the appropriateness of the penalty that he received because it denied his appeal on the basis of issue preclusion, However, the MSPB's duty to consider mitigating facts does not require de nova review of an arbitrator's assessment of the appropriateness of a penalty. Kroeger v. United States Postal Serv., 865 F.2d 235 Fed. Cir. 1981 Spranger thus has no basis for asserting that the MSPB violated it obligation to review the

appropriateness of his discipline.

III

Spranger brought race, sex and reprisal discrimination claims against the USPS under title VII the Civil Rights Act of 1964, 32 USC 2000-1, and a handicap discrimination claim pursuant to the rehabilitation Act of 1973, 29 USC 791. Spranger appears to allege that he raised a genuine issue of material fact sufficient to over come summary judgement against hi race, sex and handicap claims. he also argue that the district court wholly failed to consider his reprisal claim.

The district court granted summary judgment against Spranger's race and sex discrimination claims because Spranger (1) omitted them from his amended complaint and (2) failed to raise them before the MSPB in his Second MSPB Appeal. Spranger appears to challenge the judgment against these claims. We need not consider whether Spranger's

failure to include his race and sex claims in his amended complaint is fatal, for Spranger abandoned these claims by failing to present them to the MSPB. We review this issue de novo. See, e.g., Hays v. Postmaster General of the United States, 868 F. 2d 328 330 9th Cir, 1989.

A Plaintiff must present a discrimination claim to the MSPB in order to preserve his or her right to raise it in federal court. Id. Such claims must be brought as an affirmative defense to a discharge. 5 C.F.R. 1201.56(b). Further, a mixed-case appeal must "state specifically how the agency discriminated against the appellant. " Id, at 1201.153 (a)(1). Although and appellant may raise a new discrimination claim as of right prior to the final conference held to define the issues in the case, a new claim cannot be raised after that time except for demonstrated good cause. Id. at 1201.24

Spranger claims that the raise his rase, sex and reprisal claims orally during the hearing of his Second MSPB Appeal. However, it is clear form the record that Sranger did not raise hi race, sex or reprisal claims at any time during the Second MSPB Appeal. although a hearing officer addressed these claims Sua sponte in the MSPB's initial decision, his action did not cause Spranger to comply with any of the pleading requirements set out in the MSPB's regulations, particularly that of pleading claims before the final prehearing conference. Kosanowshy v. United States Dep't of the Army, 659 F. Supp. 872, 876 (S,D,N.Y) 1987. Not having raised his race, sex and reprisal claims before the MSPB, Spranger has abandoned them. hays, 868 F.2d at 330.

The district court determined that Spranger failed to establish a prima facie case of handicap discrimination under the Rehabilitation Act because he had provided "

no evidence that the injury to his back was anything more than to his back was anything more than a temporary, minor injury. " Spranger appears to challenge the district court's summary judgment against his handicap claim. We review the district court's decision de novo. Anderson v United States , 966 F,2d 487, 489 9th Cir, 1992).

Spranger was not handicapped person under the Rehabilitation Act. A person is handicapped if he or she" (1) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment." 29 C.R, R. 1613,702 (a) (underscore added). Spranger's claim is based on the first of these three tests for a handicap. Regulations promulgated under the Rehabilitation Act do not explain when and impairment "substantially limits" a person's

major life activities. 56 Fed. Reg. 35726, 35726 (final rule). However, the Americans with Disabilities Act (the "ADA"), 42 USC 12101, which contains an identical prohibition of handicap discrimination, does define this term. ADA regulation as well as ADA interpretive guidance, make clear that temporary, minor injuries do not "substantially limit" a person's major life activities, 29 C.F.R. 1630.2(j) 1630 App., at 407

The district court found that Spranger's two-month back sprain was a minor, temporary injury. Spranger's injury thus was not a handicap under the Rehabilitation Act.

C

Spranger argues that the district court failed to rule on his reprisal discrimination claim. The district court appears to have believed that Spranger elected not to proceed with this claim because, in its order granting

summary judgement against the amended complaint, it stated that, at a March 20, 1992 hearing, Spranger "acknowledged that he no longer claims that his termination resulted form reprisal for his union activities, That claim was separate and distinct from a claim for reprisal based on Spranger's EEO activities. The district court thus erred in concluding that Spranger had elected not to proceed with this cause of action.

Adequate grounds nevertheless exist to support summary judgment against this claim. in reviewing the district court's decision, the panel may affirm on any found supported by the record. United States v. Washington, 969 F.2d 752,755 9th Cir. 1992. Marino v, Vasquez, 812 F. 2d 499, 508 9th Cir. 1987. If the trial court decision is correct, it may be affirmed, even if the district court relied on the wrong grounds or the wrong reasoning. Washington, 959 f, 2d at 755; Marino, 812 F2d at 508. AS

with the face and sex claims, Spranger did not raise his EEO reprisal claim during the Second MSPB Appeal, Having abandoned it, he may not revive it in this federal action. hays, 868 F.2d at 330.

Affirmed.

IN THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF CALIFORNIS

EDWARD G SPRANGER,
Plaintiff,

V.

ANTHONY A. FRANK,
POSTMASTER GENERAL
UNITED STATES POSTAL
SERVICE,
Defendant

No. CIV.S-90-1595-DFL

Order

District Judge
David F. Levi

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

NO: CIV. S-90-1595-DEL

Date: April 24,1992

RE: Order and Close

United States District Judge

David F. Levi

On November 28, 1988 defendant United States Postal Service(The "Service") terminated plaintiff Edward Spranger for allegedly disobeying a supervisor's order on October 6,1988. Spranger claims that he had sustained a work- related injury and was entitled to disregard his supervisor, order to report to the Post Office medical unit before leaving work. he also asserts that his termination was substantially related to a compensable injury, and therefore improper, Spranger asks this court to overturn Merit Systems Protection Board (MSPB) decisions that

found the Service terminated him for just cause. He asserts that the MSPB erred because it found that he was obliged to follow his supervisor's order and because it found that Spranger's injury was non-compensable. The court disagrees and grants summary judgment favor of the Service.

II.

As to moving party in the summary judgment motion, the defendant bears the burden of showing that "there is no genuine issue as to any material fact and that [he is] entitled to a judgment as matter of law." Fed. R. Civ.P. 56(c). However, in order to satisfy this burden, the defendant does not need to produce evidence showing the absence of a genuine issue of material facts. Celotex v Catrett, 477 U.S. 317,325,106 S.Ct. 2548, 2554 (1986) "The burden on the moving party may be discharged by showing that is pointing out to the district court that there is an absence of

evidence to support the nonmoving party's case." Id. (discussing the burden imposed by Rule 56(c), in light of Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S. Ct. 1598 (190)).

III

The facts of this case are discussed in detail in this court's July 30,1991 order. The following is a brief summary of the facts relevant to this motion. After his termination, Spranger challenged the Service's Decision in several forums. He filed a union grievance, Complained through the Post office's Equal Employment Opportunity (EEO) process and to the Equal Employment Opportunity Commission (EEOC), and made two separate appeals to the MSPB seeking reconsideration of each appeal when the MSPB fund the termination was for just cause.

Spranger's first appeal to the MSPB (the "restoration appeal") challenged the Service's decision not to restore him to his

prior position following his recovery form a compensable injury. In his second appeal (mixed appeal), he challenged the post office EEO decision and the merits of his termination, claiming that his termination was the result of handicap discrimination. The MSPB rejected all of Spranger's arguments, finding that the Service terminated Spranger for just cause. On July 11,1990, in its final ruling, The MSPB refused to review the restoration and Mixed appeals.

Spranger file his first complaint in this court on December 26,1990, asking the court to overturn the MSPB rulings, On May 17, 1001, the service moved to dismiss and for summary judgment. The court concluded that no genuine issue existed as to any material fact regarding Spranger's claim of handicap discrimination, and granted summary judgement for the Service as to this claim. The motion to dismiss Spranger's of handicap

discrimination, and granted summary judgment for the Service as to his claim. The motion to dismiss Spranger's restoration claim was also granted. the court requested supplemental briefing as to defendant's motion for summary judgment of Spranger's claims for race, sex, and reprisal discrimination.

At oral argument on these motions, spranger asserted two claims beyond the complaint's scope. the government stipulated to the filing of an amended complaint to clarify these claims. The first claim challenged the MSPB's refusal to review the merit of Spranger's termination because of it holding that the matter was conclusively adjudicated in the arbitration of Spranger's union grievance. Spranger claimed that this was error by the Board.

The second claim challenged the MSPB's refusal to review Spranger's restoration claim in his second MSPB appeal, in the light of

later action by the United States Department of Labor's Office of Worker' Compensation Program (OWCP), because the issue had been previously adjudicated in Spranger's first appeal to the Board. Spranger argued that the Board erred in refusing tho reconsider the mater in light of ne evidence. The court granted Spranger leave to file and amended complaint adding only these claims.

IV

In his amended complaint, Spranger claims that the MSPB erred by " applying the doctrine of re judicata to denial of restoration following compensable injury to denial of restoration following compensable injury,"(the res judicata claim"). He also claims that the MSPB erred by "failing to give substantial weight incapacitated on the date in question... and therefore, failed to mitigate the penalty," (the "mitigation claim;)

At the March 20, 1992 hearing before this

court, Spranger acknowledged that he no longer claims that his termination resulted from reprisal discrimination, and he clarified the claims in his amended complaint. Spranger and the Service agreed that the amended complaint raise four issues. The first issue raised in Spranger's res judicata claim, and the final three stem form his mitigation claim.

The first issue is whether, in light of new evidence that Spranger received worker's compensation for a work related injury, the MSPB erred by applying the doctrine of res judicata to deny reconsideration of the restoration appeal. Second, in light of this same new evidence, did the MSPB err by applying the doctrine of collateral estoppel to Spranger's union arbitration proceeding, thus refusing to review the merits of Spranger's termination? Third, in light of Spranger's claim that he was not obliged to obey hid supervisor's order, did the MSPB err

by applying the doctrine of collateral estoppel to the arbitration proceeding, thus denying review of the merits of Spranger's termination? Fourth, did the MSPB err in applying collateral estoppel to the arbitration claim because the arbitrator failed to consider relevant evidence which would have mitigated the penalty of termination?

V

Spranger's first claim is that the May 23, 1989 MSPB order on his restoration appeal was erroneous because it was base on the "misrepresentation" that his injury was not compensable under worker's compensation. He argues that the MSPB did not consider evidence of misrepresentation when it decided his mixed appeal and refused to review the restoration appeal. He claims, therefore, that the July 11,1990 order denying review of the restoration appeal on res judicata grounds was

error because new evidence demonstrated that the original order was base on a misrepresentation.

This court can lift the bar of res judicata if the original decision was obtained by fraud on the court or for "other reasons in the same family." United States v. pueblo of Taos. 515 f.2d 1404. 1406(Cl.Ct. 1975). In Kissel v United States Postal Service, 42,M.S.P.R. 154 (1989), The MSPB held that his power extends to cases where the Board relies on a mistake of fact, even when the defendant is not at fault.

This court's review of MSPB decisions is limited under 5 USC 7703 (c)(1)-(3); the agency determination must be affirmed unless it is found to be: (1) arbitrary, capricious, an abuse of discretion, or other wise not in accordance with law; (2) obtained without procedure required by law, rule, or regulation having been followed; or (3) un supported by

substantial evidence. 5 USC 7703 . The Ninth Circuit has held that , "whether re judicata or collateral estoppel operates to bar a claim is a mixed question of law and fact subject to de novo review." A & A Concrete v. White Mountain Apache Tribe, 781, F.2d 1411, 1414 9th Cir, 1986). Because the MSPB applied the doctrine of res judicata, its decision to do so is reviewable de novo.

Spranger alleges that, during hearing on his restoration appeal, the Service misrepresented the facts by arguing that he was not entitled to compensation for his October 6,1988 injury, Spranger claims that the OWCP did find he was entitled to compensation for that injury in its December 19,1989 order. Spranger argues that the MSPB denied reconsideration of the restoration claim because the MSPB mistakenly believed that the OWCP denied compensation for his October 6, 1988 injury Spranger further claims

that the MSPB accepted the Service's misrepresentation that he did not have a compensable injury when he was terminated. Therefore, according to Spranger, The MSPB decision denying reconsideration was arbitrary, capricious, or otherwise not in accordance with law, and justifies lifting the bar of res judicata.

Spranger's argument fails for two reasons. First, Spranger relies on the administrative law judge's (ALJ) statement in the May 23,1989 decision that " the OWCP decision clearly states that appellant is not entitled to compensation for his injury of October 6,1988, and I therefore find that appellant's termination did not result from a compensable injury." Spranger takes this language out of context. The ALJ continue, " appellant's termination was no substantially related to a compensable injury... and.... evidence shows that appellant was removed

because he refuse to obey hid supervisor's directives ...and ... I find no merit to appellant's contention that his separation would not have occurred in the manner it did if he had not been injured, and that his injury affected his behavior." (Dft.'s Opening Brief, EX.2)

The court finds that the ALF's decision was not based on the finding that Spranger's injury was non-compensable. Although the ALJ noted that the injury was non-compensable, his decision was base on other grounds. The decision states that Spranger was removed because he refused to obey orders, and that the removal was not substantially related to Spranger's injury.

Second, the December 19, 1989 OWCP order did not grant compensation for Spranger's October 6, 1988 injury, That order states that after the October 6, 1988 injury "there was no period of total disability... However,

beginning November 29, 1988 through January 31,1989, but noted that there was no Medical evidence to establish disability on October 6, 1988.

The court finds that the May 23,1989 MSPB decision was not based on misrepresentation of mistake, The Service notified Spranger of the proposed disciplinary termination would become effective on October 27, 1988. On November 17,1988 the Service notified spranger that his termination would become effective on November 28,1988. Spranger,s first compensable injury occurred November 29, 1989. Therefore, the Service did not misrepresent facts to the MSPB when it argued that Spranger's October 6, 1988 was not compensable, Nor did the ALJ rely on any misrepresentation or mistake when he found that termination was no substantially related to a compensable injury. The court rejects Spranger's claim that the July 11, 1990 order applying res judicata and refusing to review

the merits of Spranger's termination was erroneous.

VI

Spranger challenges the MSPB's July 11, 1990 refusal to review its earlier February 20, 1989 decision. In the February 20, 1989, decision, the MSPB applied collateral eatoppel to the arbitrator's decision. The labor arbitrator found that Spranger was terminated for just cause. Spranger asserts that the MSPB erred in applying collateral estoppel to the arbitrator's decision and attacks this decision on three grounds.

(1) Evidence of Compensable Injury would have changed Arbitration Result.

In its February 20, 1989 order, the MSPB reviewed that arbitration proceeding in detail and conclude that it was appropriate to apply the doctrine of collateral estoppel to preclude further litigation of the merits of the termination.

The requirements for applying collateral estoppel are: (1) the issue previously adjudicated is identical with that now presented;(2) that issue was "actually litigated in the prior case; (3) determination of that issue was necessary to decide the prior case; and (4) the Party precluded was fully represented in the prior action. Kroeger v U.S. Postal Service, 853 F.2d 235, 239 Fed. Cir. 1988. In Kroeger, the Federal Circuit held that collateral estoppel should be applied to arbitral proceedings, where the requirements are met, in the interest of conserving judicial resources, Id. at 239, The court also note that the MSPB erred in williams v. United States Postal Service, 35 M.S.P.R. 581 1987, when the MSPB indicated that "collateral estoppel may never be applied to preclude re-litigation of issues that had been submitted to binding arbitration...." Kroeger, 865 F,2d at 239. The Kroeger court

held that " there are and will be cases in which application of collateral to an arbitration's decision is justified." Id at 239.

The factual background in Kroeger was similar to hat of the present case, In Kroeger, a preference eligible postal employee was fired for mishandling postal funds. The employee filed a grievance, and the arbitrator found that there was just cause for his removal. The employee appealed to the MSPB, which found that the charge of mishandling postal funds wa fully litigated in arbitration and subject to collateral estoppel. On appeal to the Federal Circuit, the court held that the ALJ properly applied collateral estoppel to preclude re-litigation of issues decided in the arbitration proceedings.

Spranger seeks to distinguish this case from Kroeger, arguing that he, unlike the Kroeger plaintiff, was denied and oportunity

to fully litigate his case before the arbitrator He alleges that the OWCP's subsequent decision to award compensation for Spranger's injury was never disclosed during arbitration. he further alleges that the arbitrator would have reach a different conclusion if he had considered evidence that Spranger suffered a compensable injury on October 6.1988.

A review of the arbitrator's decision discloses that, during the arbitration, Spranger introduced evidence about his october 6, only to prove that his removal should have been reduced to a lesser penalty, he did not argue that he was removed for reasons substantially related to a compensable injury on October 6, 1988 could have affected only the arbitrator's decision not to mitigate the penalty. Spranger cannot now use evidence that he sustained a compensable injury to challenge the arbitrator's decision that the termination

was for just cause, because during arbitration he made no attempt to relate the Service's decision to terminate him to his to his having suffered a compensable injury.

The February 20, 1990 MSPB order indicates that the arbitrator found Spranger was removed for repeatedly refusing to obey orders to report to the post office medical unit. The arbitrator found that credible testimony demonstrated Spranger's judgment was not impaired when he refused to follow orders, and that his act "was separate and apart from any injury he may have received in the early morning hours of that day." Arbitration Decision at 211.

Finally, the arbitrator made his decision October 6,1989. The OWCP order granting compensation was issued December 19, 1989. That order did not grant compensation for the October 6, 1988 injury, but rather for aggravation of that injury occurring after the

service had already decided to remove Spranger. For the above reasons, the finds that new evidence of a compensable injury as of November 29, 1988 is irrelevant to the arbitrator's decision. It was not error for the MSPB to apply collateral estoppel to deny Spranger an opportunity to re-litigation issues decided in the arbitration proceeding. See Kroeger, Supra

(2) Spranger's Supervisor Lacked Authority to Order Spranger to the Medical Unit. Spranger asserts that he had the right to refuse hid supervisor's order to report to the Post Office medical unit before leaving work. He further asserts that the MSPB erred by applying the doctrine of collateral estoppel to the arbitration decision, because the arbitrator erroneously held that Spranger was required to follow this order.

Spranger cites there authorities that he alleges gave him the fight to refuse an order

to go to the medical unit before leaving work. First, he refers to Service rules contain in the Employee & Labor Relations Manual (ELRM) section 543,2. He claims that under section 543,2 he had the right to choose his own physician and may decline treatment at the medical unit. However, the arbitrator found that Spranger was sent to the medical unit for an examination, not treatment. Furthermore, section 543.2, entitle " continuing Medical Treatment", does not control Spranger's case. Instead, section 543.1 which governs initial medical examinations, distinguishes between medical treatment and medical examinations, and states that "the injure party may, however, in non-emergency situations be required to be examined by a Postal Medical officer... prior to obtaining initial medical treatment".

Spranger also relies on an arbitration decision (Pltf.'s Reply, Ex. 18) regarding a

grievance filed by the National Association of Letter Carriers and the American Postal Workers Union against the United State Postal Service. The union challenged local and regional policies that required workers to submit to "pretreatment' examinations by Postal Service physicians or medical officers before being treated by their own physicians. The arbitrator found that these policies violated the terms of the then existing collective bargaining agreement. However, the arbitrator's decision is not dated. It refers only to procedures initiated in 1981, 1982, and 1983, Furthermore, the opinion contains terms from the ELRM existing at that time and the terms differ from those in the ELRM construed in Spranger's grievance. It appears that the arbitration decision dealt with matters arising under a different set of rules, and it did not give Spranger the right to disobey his supervisor's order.

Moreover, even if Spranger's supervisor lacked authority to order Spranger to the medical unit, Spranger did not have the right to disobey the order. Section 666.5 of the ELRM, the individual will never the less carry out the order and immediately file a protest in writing to the official in charge of the installation, or appeal through official channels."

Spranger's claim of error on the ground that he had the right to refuse his supervisor's is without merit, the arbitrator correctly found that Spranger violated section 666.5 of the ELRM not following his supervisor's order. The MSPB did not err when it refused to consider evidence that Spranger rightfully disobeyed his supervisor's order, and refuse to reconsider the merits of Spranger's termination.

(3) The arbitrator should have mitigated the penalty. Spranger's last claim is that

the arbitrator should have mitigated his penalty because he had received a compensable injury and rightfully refused to report to the Medical unit. Spranger claims that the MSPB should have reconsidered the merit of his termination, given that the arbitrator erroneously failed to mitigate the penalty. As explain above, Spranger did not receive a compensable injury on October 6, 1988 and so was obliged to obey his supervisor's order. The arbitrator correctly found that there was " no basis upon which to mitigate the penalty...." Arbitration Decision, page 221. Thus the MSPB did not err when it refuse to reconsider the propriety of termination penalty.

VII

Spranger's final argument is that his termination was the result of race and sex discrimination. Although Spranger alleged race

and sex discrimination in the first complaint filed with this court, he abandoned this claims in his amended complaint. Furthermore, it is not clear that the claims were adequately raised below.

The Service's EEC decision held that Spranger failed to present prima facie evidence of race or sex discrimination. Spranger's mixed appeal to the MSPB challenged the Service's EEO decision. The ALJ convened a hearing to grieve Spranger and opportunity to present evidence to support his discrimination claims. At that hearing Spranger argue that he suffered handicap discrimination, but did not argue that he suffered race or sex discrimination. In his appeal papers, Spranger did include a list of seven other employees that he claimed were similarly situated and received lesser penalties in disciplinary actions. However, Spranger did not indicate the race of any of other employees, nor did he

show that hey had a similar history of insubordination. This list without any other discussion did not adequately raise the issues below.

Finally, the MSPB found that Spranger fail to present any probative evidence of race or sex discrimination, and that the service had presented evidence which rebutted any prima facie showing of discrimination. Even were the court to find that the allegation of face or sex discrimination was raised below, considering the sparse evidence presented to this court, Spranger has failed to make a prima facie case of race of sex discrimination.

VIII

The court finds that there are no genuine issues of fact regarding whither the MSPB erred by applying the doctrine of res judicata to its earlier decision on Spranger's restoration appeal. Contrary to Spranger's

assertions, The MSPB did not rely on misrepresentation or mistake when it found that Spranger was terminated for just cause, its decision to deny reconsideration of the restoration claim wa not arbitrary, capricious, an abuse of discretion, or other wise not in accordance with law; obtained without procedures required by law, rule or regulation having been followed; or unsupported by substantial evidence. Therefore, its decision must be upheld.

As to Spranger's " Mitigation Claim" the court finds there is no new evidence that demonstrates he was denied the opportunity to fully litigate the merits of his termination during arbitration. The MSPB met all necessary requirements when it applied the doctrine of collateral estoppel to the arbitration proceeding and denied Spranger' request for reconsideration of the merit of his termination. Summary judgement is granted

in favor of the Service on both claims. Spranger's claims of race and sex discrimination are not properly before the court because they are not included in his amended complaint, and because they were no adequately raised in the below. In addition, Spranger fails to make a prima facie case of race of sex discrimination.

The clerk of the court is directed to enter judgment in fovor of the Service.

It is so orderded

David F. Levi, Judge

United States District Judge

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

DOCKET NUMBER SFO 07529010047

Date: February 20, 1990

Before

F. Lamont Liggett

Administrative Judge

INITIAL DECISION

Re: Second/Mix case appeal

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

DOCKET NUMBER SFO 07529010047

Date: February 20, 1990

Before

F. Lamont Liggett

Administrative Judge

INITIAL DECISION

INTRODUCTION

Appellant timely appealed an agency decision removing him from the position of Distribution clerk, effective November 28,1988. The Board has jurisdiction over such appeals. See 5 USC 7511-7513 For the reasons set forth below, the agency's decision is affirmed.

ANALYSIS AND FINDINGS

Appellant was removed for the following two reasons: 1) failure to follow instruction; and 2) absence without official leave (AWOL). the specifications underlying the charge

allege that on October 6, 1988 at approximately 1:00 P.M., appellant approached his supervisor, bernie shaw, with two sick leave requests. The specification further allege that shaw instructed appellant to report to the medical unit before he would approve appellant's requests. The final specification alleges that appellant completely disregarded two direct orders from his supervisor to report to the medical unit and, instead, clocked out and went home. Appellant was charged AWOL for the remainder of his shift.

By letter dated October 26, 1988, appellant was advised that his removal was being proposed base on the two charges cited above. The proposed removal letter also advised appellant that the following elements of his past disciplinary record would be considered in arriving at a penalty if the two charges were sustained:

1) May 4,1987- 30 days suspension conduct unbecoming a postal employee.

2) February 28, 1987- 14 days suspension entering the workroom floor without permission and conduct unbecoming a postal employee.

3) November 20, 1986- 7 days suspension conduct unbecoming a postal employee.

4) March 21,1985- 1 day suspension failure to follow instructions.

5) December 5, 1984- letter of Warning Failure/Refusal to follow instructions.

On November 22, 1988, appellant was served with the agency's final letter of decision sustaining the two charges and removing him effective November 28,1988. In accordance with Article 15 of the National Agreement between the United States Postal Service and the American Postal Workers' Union, appellant grieved his removal through binding arbitration. On February 14,1989, appellant also filed a formal Equal Employment

Opportunity (EEO) complaint alleging that his removal was substantively defective because of discrimination based on his race (white), sex (male), handicap (partial disability from acute back sprain), and reprisal for prior EEO activity.

On October 6, 1989, Arbitrator Kenneth M. McCaffre, after a 2-day hearing issued a decision sustaining the agency's removal action. See appeal file, tab 4B. Among the issues decided by Arbitrator Mcaffree was whether appellant's removal was taken for just cause. The decision contained findings of fact and conclusion of law that appellant was properly removed for just cause. i.e. failure to follow the instruction of his supervisor and AWOL. The arbitrator found also that appellant's testimony was inconsistent with the credible testimonies of three agency witnesses, supervisor Shaw, Mr. Myers. and Mr. Dumas. According to the evidentiary record,

Myers, and Mr Dumas. According to the evidentiary record, Myers and Dumas both heard Shaw repeatedly order appellant to report to the medical unit. it was never disputed that appellant failed to report to the medical unit, or that he clocked-out and left the facility at approximately 1:00 P.M. Further, the arbitrator found that, in view of appellant's prior disciplinary record, the removal penalty was reasonable, appellant was not the victim of disparate treatment, nor did he (appellant) establish that the removal was taken as an act of reprisal for his prior EEO Activity, finally, the arbitrator found that due to the serious and intentional nature of appellant's misconduct, there were no factors in mitigation sufficient to disturb the agency's removal penalty.

On september 15,1989, the agency EEO office issued a final 6-page decision finding that appellant had failed to establish a prima

facie case of either race, sex, physical handicap or reprisal discrimination. See Appeal file, Tab. 4D

Additionally, the record contains a 6-page decision by administrative Judge Francis A. Lee of the Board, finding, in connection with appellant's appeal of the agency's failure to restore him, that appellant was removed from his position because he refused to obey his supervisor's directives to return to the medical unit and because he absented himself from work without permission. see Spranger v. United States Postal Service, MSPB Docket No. SF03538910306, (initial decision, May 23,2989). Appellant timely filed a petition for review of the Judge Lee's initial decision. By order dated September 27, 1989, The Board denied appellant's petition for review. see appeal File, Tab 4C.

APPLICATION OF THE DOCTRINE OF COLLATERAL ESTOPPEL

In williams v. United States Postal Service, 35 M.S.P.R.581 1987, the Board addressed the question of whether it was proper, in the case of a postal service preference eligible, to apply the doctrine of collateral estoppel to and employee's appeal based upon and arbitrator's decision rendered pursuant to a negotiated grievance procedure. The Board in williams held that application of the doctrine of collateral estoppel was inappropriate in arbitral proceedings. instead, the Board held that it would accord deference to Postal Service arbitration decisions and would set aside or modify those decisions only where the appellant showed that the arbitrator erred in interpreting civil service law, rules or regulations.

Subsequent to Board's decision in williams the Court of appeals for the Federal Circuit decided Kroeger v United States Postal Service, 865 F.2d 235,239 Fed. Cir 1988. The

court held that it was error to find that collateral estoppel may never be applied to arbitral proceedings, See Kroeger, 865 F.2d at 239. Thereafter, in Berkey v United States Postal Service, MSPB Docket No. SE07528610203, Sept. 27,1989, The Board modified its holding in williams to be consistent with the Federal Circuit as decision in Kroeger, See Berkey, At 5.

The criteria for the application of collateral estoppel are. 1) The issue previously adjudicated is identical to the issue now presented; 2) that issue was actually litigated in the prior action; 3) the determination in the prior action was necessary to the resultant judgment; and 4) the party precluded was fully represented in the prior action.

After carefully reviewing the evidentiary record in this matter, I find that application of the doctrine of collateral estoppel is

appropriate on the merits of the agency's stated charges. To the extent that appellant did not raise his affirmative defenses of race, sex, and handicap discrimination before the arbitrator, I convened a Board hearing to afford him an opportunity to address those claims. Upon review, however, I find that appellant failed to present any probative evidence to establish his threadbare allegations. Therefore, I find that any prima facie showing of race, sex, or handicap discrimination was rebutted by the agency's articulation of legitimate nondiscriminatory reasons (failure to follow instructions and AWOL) for his removal; and appellant's failure to show pretext. See steward v United States Postal Service, 9 M.S.P.R. 71 (1981)

Base on the foregoing, I find that the charges are sustained. Appellant's removal was taken for such cause as promotes service efficiency, and that the penalty of removal

under all the circumstance does not exceed the tolerable limits of reasonableness. SEE Douglas v Veterans Asministration, 5 M.S.P.R 280, 306 (1981)

DECISION

The agency's action is affirmed.

F. Lamont Liggett

Administrative Judge

U.S DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKER'S COMPENSATION PROGRAMS

COMPENSATION AWARD

CASE NO: A13-872156

DATE: DECEMBER 19,1989

U.S DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKER'S COMPENSATION PROGRAMS

CASE NO: A13-872156

FINDINGS OF FACT

Unpon the foregoing finding of fact, it is ordered that the claim for continuation of pay and compensation be accepted. Continuation of pay is authorized for November 29,1988, through January 12,1989, Compensation is authorized for January 13,1989, through January 31,1989. It is ordered that the claim for further compensation and medical benefits effective February 1,1989, and same is hereby rejected for the following reason: The medical evidence establishes that the claimant had no further residual of his October 6, 1988, work injury effective February 1, 1989.

Given under my hand at San Francisco Ca. this 19th day of December, 1989.

C.Conner Senior claims examiner

Office of workers' compensation programs

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

DOCKET NUMBER SFO 03538910306

Date: May 23,1989

Re: First MSPB Appeal Restoration Right

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

DOCKET NUMBER SFO 03538910306

Date: May 23,1989

Before

Francis A. Lee

Administrative Judge

INITIAL DECISION

Appellant appealed the agency's denial of his alleged restoration rights following an on the job injury. In response, the agency moved for dismissal for lack of jurisdiction. the agency claims appellant was not entitled to restoration. For the reason set forth below, appellant's appeal is dismissed for lack of jurisdiction.

Jurisdiction

Appellant explained that during his employment with the agency he had suffered an on the job injury for which he received

benefits, beginning October 26,1988, from the office of Worker's Compensation, Department of Labor. Appellant further explained that after the agency removed him, effective November 28,1988, for failure to following instructions and awol, he recovered, on January 26, 1989, from his injury. On February 1,1989, appellant requested the agency restore him to employment, but the agency failed to do so. Although appellant acknowledged that he was removed by the for cause, he claims that the Board has jurisdiction under 5 C.F.R. 353,301 for his appeal because his separation would not have occurred in the manner it did if he had not been injured and, under 5 USC 8151 (b)(1), he is entitled to restoration.

Title 5 USC 8158 (b)(1) provides that under regulations issued by the Office of personnel Management (OPM) if the injury or disability of an employee has been overcome

within one year after the date of commencement of compensation, the employee has the right to resume his former, or equivalent, position. the employee is also entitled to other attendant rights which the employee would have had, or acquired, in his former position had he not been injured or disabled. Title 5 C.F.R. 353.401 (a) provides that an employee who is entitled to restoration under e USC 8151, and who is denied restoration by his agency, may appeal to the Board.

Under 5 USC 8151 and 5 C.F.R. 353,103, restoration rights pertain to an employee who has sustained a compensable injury. and employee whose separation either resulted from, or was substantially related to, a compensable injury is entitle to restoration. Miner v. United States Postal Service, 31, M.S.P.R. 369, 372 (1986), aff'd 819 F.2d 280 fed. Cir 1987.

The record evidence shows that appellant's employment with the agency was terminated because the allegedly failed to follow instruction, and was AWOL for two hours on October 6, 1988.Additionally, in choosing the removal penalty, the agency considered appellant's past disciplinary record of a thirty days suspension for conduct unbecoming a postal employee; a fourteen day suspension for interning the workroom floor without permission and conduct unbecoming an employee; a seven day suspension for conduct unbecoming a postal employee; a one day suspension for failure to follow instruction; and a letter of warning for failure/ refusal to follow instructions.

The charge of failure to follow instruction, as set forth alleged misconduct on October 26, 1988, concerns appellant's alleged misconduct on October 6,1988. On that day, appellant

reported to his supervisor that he had been injured on the job. Appellant's supervisor the sent him to the agency's Medical unit. The Medical Unit doctor diagnosed appellant's condition a acute lumbar strain, but did not indicate that appellant was unable to work. in accordance with its instructions, the agency gave appellant alight duty assignment, but appellant said that he did not agree with the instructions and he requested sick leave instead. Appellant's supervisor then directed appellant to return to the Medical Unit prior to receiving authorization for leave, but appellant refused and he left work. Appellant's period of absence from work was charged as AWOL.

Appellant claims that he suffered a compensable injury, for which he received OWCP compensation. However, included in the record evidence is an OWCP decision of February 1,

1989, denying appellant's compensation claim because his termination from employment was for misconduct unrelated to his injury. IN support of his claim, appellant submitted copies of statements from the Department of Labor showing payments to doctor during the period November 29, 1988, through March 16,1989, subsequent to his removal. but the OWCP decision clearly states that appellant is not entitled to compensation for his injury of October 6, 1988, and I therefore find that appellant's din not result from a compensable injury.

Moreover, the record evidence show, and I find, that appellant's termination was not substantially related to a compensable injury. This evidence shows that appellant was removed because he refused to obey his supervisor's directives to return to the Medical Unit, to perform assigned light duty, and because he

absented himself from work without authorization. Appellant does not deny he failed to comply with his supervisor's directives and he acknowledged absenting himself from work. I find no merit to appellant. contention that his separation would not have occurred in the manner it did if he had not been injured, and that his injury affected his behavior. The record evidence shows that the injury only precipitated the chain of events which ended in his removal, but that the was not substantially related to a compensable injury. See Miner at 372. Accordingly, I find that appellant has failed to meet his burden of showing the Board's jurisdiction for his appeal. See 5 C.R.R 1201.56.

In view of this finding of no jurisdiction, no consideration is given here to appellant's claim of harmful procedural

errors. Finally, although appellant requested a hearing in connection with his appeal. such

hearing is warranted only when appellant makes a non frivolous claim which would establish Board jurisdiction. See Manning v. Merit Systems Protection Board, 742 F. 2d 1424 Fed. Cir. 1984. Appellant has made no such claim, and I find that a hearing is not appropriate in this case.

Decision

The petition is Dismissed.

Francis A Lee

Administrative Judge

UNITED STATES
POSTAL SERVICE

DATE: FEBRUARY 24,1989

RE: LETTER DENIAL OF RESTORATION RIGHT

UNITED STATES
POSTAL SERVICE

DATE: FEBRUARY 24,1989

Dear Mr. Spranger:

This Letter is being sent in response to your request for restoration to the United States Postal Service.

We have received the Department of Labor decision concerning your claim for compensation benefits. Your claim was rejected because the Department of Labor found that you had loss and to continuation of pay when your misconduct unrelated to your injury resulted in termination by the United States Postal Service. Therefore, you are not entitle to restoration rights under 5 CFR 353, 301 (c).

Martin Topper
Manager, Employment and Development
Sacramento, CA. 95813

U.S DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKER'S COMPENSATION PROGRAMS

COMPENSATION DENIAL

CASE NO: A13-872156

DATE: FEBRUARY 1, 1989

U.S DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF WORKER'S COMPENSATION PROGRAMS

CASE NO: A13 872156

FINDING OF FACT

Upon the foregoing findings of fact, it is ordered that the claim for compensation b, and the same is hereby rejected for the following reason: The Claimant lost his entitlement to compensation for wage loss and to continuation of pay when his misconduct unrelated to his injury resulted in termination by his employer.

Office of Workers' Compensation Programs

Stephen J.Connacher

Senior Claims Examiner

United States

Postal Service

Date: November 21,1988

Re: Grievance 88C624GC Decision

United States

Postal Service

Date: November 21,1988

Re: Grievance 88C624GC Decision

The grievant's failure to follow this supervisor's instructions to report to the Medical Unit, and uncooperative attitude in exchanging information with his supervisor supports the charge of AWOL. Due to the fact that Mr. Spranger was involved in and on the job injury on the date in question, mr. Shaw was action to protect the interests of the Postal Service, by attempting to get Mr. Spranger to return to the Medical Unit for verification of his illness. The Medical Unit also acts as a control point in administering initial medical treatment for employees injured on the job, and coordination of any outside medical that is either requested by the employee or deemed necessary by the Postal

physician. In many instances, employees are required to clear the Medical unit prior to be sent home with a slip that states, employee should be sent home sick. The employee is then returned to his supervisor or that the employee requests to go home. Mr. Spranger's refusal to return to the Medical Unit removed the opportunity for the Medical Unit to act in their capacity as the control point in the asministration of his accident, and cut off any further dialogue with the supervisor that normally occurs with employees are requesting to go home.

For the above stated reasons, the grievance is denied.

Henry Anos

Acting Labor Relation Representative

Sacramento Division

William G. Arbonies, M.D.
Division Medical Officer
Sacramento, Ca. 95813
916 921-4428

Date: December 1,1988

Diagnosis

William G. Arbonies, M.D.
Division Medical Officer
Sacramento, Ca. 95813
916 921-4428

Date: December 1,1988

Re: Edward G Spranger

Vuong Minh Duc, M.D.

Dear: Dr. Duc:

On 10/6/88, Mr. Spranger reported to the Medical Unit with a complaint of upper back pain. He stated that while pulling a loaded hamper he developed upper back pain. On examination, it was noted that flexion and extension of his back was limited due to the pain. The diagnosis was acute back strain. He was given an ice application and was placed on Robaxin. He declined the offer of Limited/Light duty.

Vuong minh Duc, M.D
2322 Butano Drive
Sacramento, Ca 95825
916 488-2555

Date: December 29 1989

Diagnosis

Vuong minh Duc, M.D
2322 Butano Drive
Sacramento, Ca 95825
916 488-2555

To Whom This May Concern

Date: December 29,1989

This to certify that Mr. Edward Spranger has been seen in my office on 11/29/88; 12/15/88; 01/24/89; and 02/24/89 following a work related injury which occurred on 10/06/88. Based on my examination and diagnosis the patient was partially disable and unable to perform his full duty starting on 10/06/88.